THE INCOME TAX AND THE CONSTITUTION.

THE committee of style of the constitutional convention of 1787 recognized in its famous report three kinds of taxation; namely, "direct taxes," "duties, imposts and excises," and the "capitation tax." The first and third of these were to be apportioned among the various states in proportion to their population as shown by the census. By a clause which had been already adopted and apparently dropped out in this report by some accident, and which was thereafter restored by unanimous vote, it was provided that the second class should be uniform throughout the United States. By a subsequent verbal amendment, moved on the floor for another purpose and passed without debate, the capitation tax came to be classed among the direct taxes, although it had been treated separately since an early stage of the proceedings of that body, including the report of the committee of detail. In the course of debate one prominent member asked what direct taxation was, and no one answered him.[1] This constitutional question has been debated from time to time ever since, apparently settled once, unsettled again, and still remains in doubt.

If we had fuller reports of what was said in the convention, and in the various state conventions which followed it, we might know better what the various leaders individually understood to be the meaning of these tax clauses. Unfortunately the proceedings of the main convention, very much condensed at best, are particularly meagre on this point. Its proceedings were secret, and it had no reporter. Madison has preserved for us an abstract of the occurrences which struck him at the time as important; but one of the most significant has been preserved only in a paper by another member,[2] and in an abstract so brief there must be many such omissions in matters of detail which would now be of the highest

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[1] U. S. Const., Art. 1, §§ 2, 8, 9. See 5 Ell. Deb., 2 ed., 379, 451, 503, 543, 545.

[2] The hush word about stamp duties reported by Luther Martin (1 *ibid.* 368). *Cf.* Madison's abstract (5 *ibid.* 432). Of course it is possible that what Martin reports was not part of the formal proceedings; but this would only accentuate the fact that we are apt to overestimate the sufficiency of our information about what the framers of the Constitution had in mind.

value. Some of the most important of the state conventions are reported either by a mere fragment[1] or not at all.[2] Of the few which are more fully reported, we have naturally more of the oratorical elegances[3] that were written out and handed to the reporter than we have of the actual discussions upon matters of dry practical detail,[4] and while many of the speeches were evidently written out or abstracted by the speaker himself, the running debate is so badly reported as to be very unreliable as evidence.[5] Probably the tax clauses did not convey the same ideas to the minds of all who voted upon them (a thing not unnatural when some were primarily economists, although most were primarily lawyers, and when the systems and nomenclature of taxation had always varied so radically in the different colonies[6]). All the different ratifying conventions may not have understood these clauses alike in every detail. Even in the main convention there were probably comparatively few who thought them out to their logical results, just as there were few who thought out what was involved in the power to regulate commerce; but it is improbable that the members who paid special attention to this subject did not understand each other, although it is altogether likely to have been one of those subjects which were threshed out during their evening discussions rather than upon the floor.[7]

Congress at once, and with the approval of the Washington administration, began giving a very wide scope to the "duties" clause. At its second session it laid a duty, upon the principle of uniformity, upon all country stills at a fixed rate per gallon capacity. This was intended for practical reasons as a substitute for

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[1] New Hampshire, Connecticut, Pennsylvania, and Maryland.

[2] New Jersey, Delaware, and Georgia. Rhode Island held no convention.

[3] See, *e. g.*, Massachusetts, 2 Ell. Deb., 2 ed., 174.

[4] "Many questions were asked the honorable gentlemen who framed the Constitution, to which answers apparently satisfactory were given. . . . Mr. Parsons considered the several charges of ambiguity which gentlemen had laid to the Constitution, and with a great deal of accuracy stated the obvious meaning of the clauses thus supposed to be ambiguous." Massachusetts, *ibid.* 101, 104.

[5] Thus it is not at all clear that Jay meant to include specific duties among direct taxes, as inferred in 157 U. S. 567 (see 2 Ell. Deb., 2 ed., 381), and I venture to believe that Marshall was clearer than he has been made to appear (157 U. S. 567; see 3 Ell. Deb., 2 ed., 229, 236).

[6] Report of Oliver Wolcott, Secretary of the Treasury, December 14, 1796 (Annals of Congress, 1795–7, 2635–2713); E. R. A. Seligman, Colonial and State Income Taxes, 10 Pol. Sci. Quar. 221 *et seq.*

[7] See 1 Sparks, Gouverneur Morris, 282–6.

the more usual form of excise upon the manufacture of liquor, but was in its essence, like the contemporary English duty on houses, a tax upon improvements to real estate.[1]

In 1794 Congress imposed certain "annual duties and rates" upon carriages, whether "kept by or for any person for his or her own use, or to be let out to hire or for the convenience of passengers."[2] Economically, upon the test of shiftableness, the tax upon the first class of carriages would be direct, and upon the second class indirect. The constitutionality of the law was disputed particularly by Madison and other leading Virginians; and a test case for the recovery of sixteen dollars was made up in Virginia for the purpose of obtaining an opinion from the United States Supreme Court.[3] It was argued early in 1796 before an array of judges every one of whom had been a member of the constitutional convention of 1787, or of one of the state ratifying conventions, or both.[4] To this remarkable body of men was presented the precise question whether a duty upon an article of personal property kept solely for the enjoyment of its owner was

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[1] Act of March 3, 1791, c. 81, § 21. The administration which recommended this bill included the president of the constitutional convention, one of the members of its committee of detail (Randolph), and one of the members of its committee of style (Hamilton). Wolcott thought a tax on houses indirect (Report, 2707, 2709). Nicholas thought the same of a window tax (*ibid.*, 2179), although Gallatin thought not (Annals, 1795–7, 1893). This is curious, since Nicholas has been quoted as a believer in the broader definition of direct taxes (157 U. S., at 567–8).

[2] 1 Stat. at L. 373, c. 32.

[3] Hylton *v.* United States, 3 Dall. (U. S.) 171.

[4] Ellsworth, C. J., who took no part in the decision because he had not heard the whole of the argument, but probably contributed to the information of the court, had been a member of the convention of 1787 and of the Connecticut convention, had been one of the five members of the committee of detail (the others being Gorham, Wilson, Randolph, and Rutledge), and had paid special attention to taxation. He had been a leader in the first Senate. Wilson, J., is considered to have been one of the most influential members of the convention of 1787 (1 Curtis, Const. Hist. of U. S., 642), and had spoken for the committee of detail upon this subject (5 Ell. Deb., 2 ed., 432). He had also been a leading member of the Pennsylvania convention, and was familiar with the French economists (2 *ibid.* 483). His opinion would have been the most valuable, but was rendered at circuit, and has not been preserved. Paterson, J., had been a prominent member of the convention of 1787. Chase, J., had been one of the leading members of the Maryland convention (2 *ibid.* 549). Chase and Wilson, JJ., had both participated in the debates of the Continental Congress upon the tax question (1 *ibid.* 70, 72, 77; 5 *ibid.* 39–40, 62, 65, 67). Ellsworth, C. J., and Paterson, J., had been members of an early special committee of the convention of 1787 on this subject, and the latter had proposed a plan about it (5 *ibid.* 191–2, 270–3). Iredell, J., had been a member of the North Carolina convention. Ingersoll, for the plaintiff in error, like his opponent Hamilton, had been a member of the convention of 1787.

or was not a direct tax.[1] Of the arguments only a fragment survives, five pages representing a three-hour discussion for defendant in error by Alexander Hamilton, who had acted on the committee of style in 1787, and had recommended the tax under consideration as Secretary of the Treasury. He argued that direct and indirect taxation had no settled legal meanings; that by the test of shiftableness this tax would be part direct and part indirect, which would be absurd; that by the prevailing political economy taxes upon lands are called direct and all others indirect, because "all taxes fall ultimately upon land, and are paid out of its produce, whether laid immediately upon itself, or upon any other thing"; that a rule must be adopted which would not involve "preposterous consequences"; that this tax would in the British statutes be an excise; and that "where so important a distinction in the Constitution is to be realized, it is fair to seek the meanings of terms in the statutory language of that country from which our jurisprudence is derived."[2] All the judges concurred in holding the tax to be constitutional, although not apportioned; that it was "within the power granted to Congress to lay duties"; and this, among other reasons, because it was not a tax that could be practically apportioned, and because it would be a duty within the definition in Great Britain, "from whence we take our general ideas of taxes, duties, imposts, excises, customs, etc."[3]

In five cases arising after the civil war the fundamental question was discussed at great length before the Supreme Court, whose then members reached unanimously the conclusion that the principle of this early decision applied to the case of a general income tax upon real and personal property, and that such a tax was therefore to be classified as a duty and levied under the rule of uniformity, and need not be apportioned among the states in

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[1] It was in fact a fictitious case. Hylton conceded that he kept one hundred and twenty-five chariots exclusively for his own personal use, more than then existed in Virginia, but no more than thought necessary to the jurisdiction of the court.

[2] Works of Alexander Hamilton, Lodge's ed., vii., 328–33. See Œuvres de Turgot, 1844 ed., i., 394, 396, 417. Turgot, then a high authority, thought that there were only three possible forms of taxation; the direct on lands, the direct on persons (capitation tax), and the indirect tax. The latter included the tax on the profits of money or of industry. Adam Smith's work is quoted by the court, but is less likely to have influenced the convention than the writings of Locke and the French economists. It was not reprinted in America till 1789. Smith had his own idea of an indirect tax, not subject to the test of shiftableness (3 Dall. (U. S.), at 180).

[3] 3 Dall. (U. S.), at 174, 175, 181.

accordance with their population.[1] In the Scholey case, which related to a succession tax upon real estate, the court stated that an income tax could not be distinguished in principle from a succession tax. In the final Springer case the principle was applied to a general graduated tax upon individual incomes, the minimum income bearing the highest rate of tax under the law then before the court being $10,000. These cases were elaborately argued, and in deciding the last one the court announced its conclusion "that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."[2]

These were war taxes, and had been repealed long before the last of these decisions. A few years after them, however, Congress was faced with a deficit in the treasury which was caused by the recent assumption of expenses that were a legacy of the war.[3] The party controlling the House of Representatives, accepting the theory that the prevailing taxes on consumption bore especially hard upon the smaller incomes, undertook to make up the deficit with a compensatory duty upon the larger ones. In order to avoid the constitutional objections that were threatened, the new income tax law was drawn so as to follow closely the lines of the earlier ones, and to come clearly within the decisions that had sustained them; and for this reason proposed improvements in administration were rejected.[4] The law took effect August 28, 1894. On December 22 the attack upon it began. A bill was filed in the Supreme Court of the District of Columbia to restrain the Commissioner of Internal Revenue from collecting the tax. The case was argued ably and elaborately for the complainant, but dismissed on January 23. It is notable that counsel felt obliged by the previous decisions to

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[1] Pacific Insurance Company *v.* Soule, 7 Wall. (U. S.) 433 (1868); Farmington *v.* Saunders (the cotton tax case, affirmed by a divided court without opinion); Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533 (1870); Scholey *v.* Rew, 23 Wall. (U. S.) 331 (1874); Springer *v.* United States, 102 U. S. 586 (1880). The first of these concerned a tax on the total net income of certain classes of corporations. The argument that this included rents and to that extent indirectly reached the land, in the case of corporations which drew part of their income from land, was brought before the court (Brief of W. O. Bartlett, cited at 7 Wall. (U. S.) 438).

[2] 102 U. S., at 602.

[3] The deficit for the fiscal year 1894 was $69,803,260.58, of which $12,100,208.89 was due to the sugar bounties, which were repealed. The payments under the new Pension Act of 1890 were $57,900,173.54. The total civil war pension amounted to $140,000,000.

[4] Some amendments were made by the Senate introducing large exemptions whose effect was not passed upon by the court.

concede that the law did not impose a direct tax,[1] and to base his attack solely upon the uniformity clause of the Constitution. At about the time of the argument of this case, two more were commenced. These were cases to which neither the United States nor any of its officers were parties. They were stockholders' suits brought in New York against certain trust companies, for the purpose of restraining the latter from paying the new tax upon their incomes.[2] The theory of the suits was ingenious, but it was believed by the government that it was too fictitious to be entertained by the courts. For the bills did not even aver that the defendants intended to pay the taxes without protest, and as to taxes paid under protest there is a well-settled remedy by action at law against a solvent defendant, so that no irreparable injury can be anticipated. They came up rapidly, however, by means of *pro forma* rulings, thus losing the very important advantage of a rehearsal in a lower court, and were advanced for hearing at an early day; and in the very complex legal, political, and financial situation at the moment, it was not felt advisable by the government, notwithstanding the many disadvantages to which it was put by insufficient notice and by its position as a mere *amicus curiae*, to urge any delay, or any objections which might seem to the public technical, or to do more than perform its duty to the court by calling attention to the fact that these New York suits appeared to it to be moot cases. Meanwhile the case first begun was hurried through the local Court of Appeals[3] and was directed to be argued with the other two.[4] The government rested upon the earlier decisions as to the directness of the tax,[5] devoting its main attention to the question of uniformity. A singular result ensued. The court decided by a vote of six to two that so much of the duty as included rents and income from real estate was void as a direct tax. It stood equally divided as to whether this invalidated the whole act; as to whether a tax upon income of personal property was

[1] Moore *v.* Miller, 5 App. D. C. 413, 417. The bill was filed by Shellabarger & Wilson, a firm both of whose members were leaders at the Washington bar, and by Senator Edmunds. After the direct tax point was contested in New York the concession was retracted.

[2] Hyde *v.* Continental Trust Co., filed January 11, 1895; Pollock *v.* Farmers' Loan & Trust Co., filed January 19, 1895.

[3] 5 App. D. C., at 434–5.

[4] There were strong objections to the procedure in this case also. It was never decided, but ultimately dismissed by the appellant (163 U. S. 696).

[5] Argument of Attorney-General Olney, pp. 4–5.

direct; and as to whether any part of the tax, if not considered as a direct tax, was invalid for want of uniformity. It unanimously held that income from municipal bonds must be excluded. It directed a decree for complainant "in respect only of the voluntary payment of the tax on rents and income of the real estate" and of municipal bonds.[1] The complainants immediately moved for a rehearing on the theory that the rents were inseparable from the rest of the income, that the tax was a unit, and that if the rents could not be included the whole tax was therefore void. The government joined in the request for a rehearing, and upon the oral argument squarely conceded its grounds to be correct. The direct tax question was then for the first time argued on both sides upon its original merits. A full bench attended, although for the ninth judge his attendance was expected by him to be, and proved to be, his death warrant. He sustained the government's contention. Of the two judges whose previous position had been conceded by both sides to be untenable, one now gave full adhesion to the government's position, while the other changed in the contrary direction. The net result was a complete overthrow of the tax by a vote of five to four.[2]

It is not the plan of this article to comment upon the advisability of a court's reversing its own previous decisions upon a point of political controversy, or upon any of the other subjects which were discussed in the dissenting opinions, and so extensively also in the periodical literature of the time. Something, however, of interest to the profession seems to remain to be said upon three points: whether the direct tax question is an open one; what, if so, are its original merits (for these the four dissenting judges refused to consider); and, if it is desirable that the controversy be ended by a constitutional amendment, what amendment should be made.

So far as the income tax decisions of 1895 may have been based upon any economic definition or reasoning, they have been overruled by the succession tax cases of 1900.[3] If the test of shiftable-

[1] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 586. The separability of the rents was not suggested in the bills of complaint, but was a point raised in the brief and argument. It had never been raised in the litigations over the civil war revenue laws, but on the contrary the tax had been regarded as a unit (Memphis R. R. Co. *v.* United States, 108 U. S. 228, 234).

[2] 158 U. S. 601.

[3] Knowlton *v.* Moore, 178 U. S. 41 (1900). This is true even as to the matter of the municipal bonds. Murdock *v.* Ward, *ibid.* 139. This case, it seems to me, answers the argument based upon the Attorney-General's concession at 158 U. S. 630. If the

ness be the true one, neither form of taxation is less direct than the other. Neither can be shifted by the taxpayer to anybody else.[1] Apart from the element of shiftableness, a succession tax is direct in a much more positive sense than is a general income tax. The latter is a tax upon the net income which the individual received during the next previous year. Part of that income, if not all of it, is gone and spent. Unless the income of the person taxed is derived entirely from investments, and unless there has been no change in those investments, the property from which the tax, if at all, will be collected is not the property whose produce was an element in estimating its amount. Moreover, gross income bears so little proportion to selling value, and from gross income there must be so many deductions in arriving at the amount of a tax on net income, that the amount of such a tax would bear usually no proportion to the valuation of any property owned by the taxpayer, even if the income tax were a tax measured by the sum of the net incomes of the taxpayer's various properties, added to his net earnings; but even this last is not true, for he deducts his outgo by reason of indebtednesses which did not arise from his property and had no relation to it or to his profession. In short, the property from which all or a part of his income for the past year may have been derived is not theoretically or always, even in the case of a man living on his property and earning nothing, either the measure of the tax or the fund out of which it is eventually paid. A succession tax on the other hand is measured by the valuation of certain property at a particular moment, and is collected by impounding that particular property or its proceeds. The federal succession tax was not in theory, like similar taxes laid by the states,[2] a condition attached to the granting of a privilege; for the privilege of succeeding to the

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income tax is a unit, the interest on municipal bonds cannot be traced and deducted. If it is not a unit, it is not a true income tax. The writer was informed that Jackson, J., did not agree with the decision at 157 U. S. 583 as to the municipal bonds, but the point was not argued on the rehearing. He, and others of the judges, did not admit the correctness of the concession that the income tax then before the court was a unit.

[1] This is generally assumed to be the economic test, but was not that of the early economists, and is generally abandoned as valueless by their present-day successors, who recognize no distinction between direct and indirect that could be made the basis of a practical system of taxation. Other unshiftable taxes now laid under the rule of uniformity, and sustained by the Supreme Court, are those on state bank circulation.

[2] United States *v.* Perkins, 163 U. S. 625; Matter of Lansing, 182 N. Y. 238, 248.

property of a decedent is granted by the state, not by the nation. The succession tax was distinguished from the income tax by calling it a duty or excise, laid by the United States upon the exercise of this privilege.[1] Calling a tax an excise, however, does not change its economical definition or its practical operation or its essential nature. The distinction is verbal. But a legal rule which can be avoided by a mere form of words is not really based upon public policy.[2] Taxes which were admittedly unconstitutional as laid have been in the past sustained by the insertion of such a clause as that the tax, however measured, was upon franchises and not upon property.[3] Suppose that a future income tax law, varying perhaps slightly in its substantial provisions except in the absence of deductions from income, should recite that it was laid as a duty or excise upon the past net income as a unit, and should be defended upon the analogy of the excise upon successions and upon corporate franchises, and the court should be faced with the question whether the insubstantial distinction between this new law and the law that was overthrown in 1895, or the other insubstantial distinction between the new law and the succession tax law that was sustained in 1900, should prevail; — the power of the nation to supply its treasury in time of stress depending upon the result. It is easy to perceive that the court would not hastily decide to refuse a consideration of the new law upon the merits.

If the new law were taken up for consideration upon the merits, the first question considered would be the relative weight to be given to the various income tax decisions of the past. The court would be faced with a problem which has never faced it before; namely, whether one series of decisions should be given greater weight because they were unanimous upon the point involved, and because one of them was substantially contemporaneous with the Constitution itself, and was enunciated by men who were witnesses as well as judges as to the meaning of the words used in that instrument, or whether another decision should be given greater weight because it was later in point of time, and was regarded by

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[1] 178 U. S., at 83.

[2] Jessel, M. R., in Bellairs *v.* Bellairs, L. R. 18 Eq. 510, 516.

[3] People *v.* Home Insurance Co., 92 N. Y. 328, affirmed 134 U. S. 594, construing an amendment re-enacting a tax law with insertion of the words "as a tax upon its corporate franchise or business," and following Hamilton Co. *v.* Massachusetts, 6 Wall. (U. S.) 632. See also Murdock *v.* Ward, 178 U. S., at 146–8.

five out of the nine judges then comprising the court as distinguishable from the earlier ones, or as overruling them. On the one hand it will be urged that all of these decisions alike are in the past; that there is no presumption in favor of the correctness of a decision at one time in the past as against a decision at another time in the past; that greater weight is given to contemporaneous construction of an instrument than to the construction of a century later; that a unanimous decision, say thirty years old, is more weighty than the opinion of the odd judge in a divided tribunal fifteen years old; that the conditions surrounding the litigations of 1895 were not those best calculated to produce a correct result; that the prevailing opinions of that year should be given only the weight due to the distinguished jurists who uttered them, and should be treated rather indeed as minority opinions in the general examination of all of the utterances of the court during more than a century upon the general subject. It would be said that our constitutional development should not be arrested, much less put back, by an accident, and that the vote of the odd judge in a five to four decision is but an accident.[1] On the other hand, if it be true that the confidence of the people in the judiciary was weakened in 1895 by an overruling of earlier decisions upon a point of political controversy in a time of political excitement, and that the logical and probable result of such a course would make the Constitution so plastic at all points in the hands of the contemporary judges that each new party in power would feel charged with the duty of providing a court that would sustain its own proposed legislation, then it would be urged that this loosening of the distinction between the legislature and judiciary would become much more imminent if the court, however unwise it may have been at the last occasion, should for a second time reopen a political controversy, even to restore the Constitution as originally defined. The problem is a difficult one, from whichever side it be viewed, one as to which a lawyer would hesitate either to express his own opinion

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[1] "A decision made by but five judges against four dissentients, the nine having been selected without the slightest foreknowledge of the problem which is to be submitted to them for solution, is but an accident. Mr. Justice A dies in February instead of March. President B appoints his successor. Had he lived a month longer, President C would have appointed his successor, the case of Smith *v.* Jones would be decided the other way, and the future course of history be changed. We have banished the lottery from ordinary life, but we retain it among the most powerful instruments of legislation." 2 Colum. L. Rev. 79.

or predict that of the court, and one with which lawyers hope that the court will never be faced.

Whether the judges of 1796 were right in declaring a duty upon the use of personal property not to be a direct tax within the meaning of the instrument which they had helped to frame, whether their successors of 1880 were right in holding that a general duty upon net incomes was for the same reason not a direct tax within the meaning of that instrument, is a question which will always be interesting in itself even if it be deprived of practical importance by constitutional amendment, because it is a question of history as well as of law. Indeed the prevailing opinion of 1895, so far as it is not shaken by the later decisions, seems to me to be based upon a purely historical line of reasoning, whose acceptance by the ultimate verdict of historians I think a matter of doubt. Upon matters as to which the Supreme Court of the United States was as nearly as possible equally divided, a confident expression of opinion would be presumptuous in any one, and especially in one who took part in the litigation. His function is rather to call attention to the various phases of the case, and leave others to follow up his suggestions. If the contemporary understanding of the tax clauses of the Constitution comes ever under complete investigation according to the recognized canons of historical criticism, a vast amount of material will be found on file in the income tax cases of 1895; but it will probably not be found complete. Probably no question of such difficulty and importance was ever presented with so little time for preparation. Upon the part of the complainants a considerable number of quotations, favorable to their view, from the controversial writings and private correspondence of the statesmen of the eighteenth century were submitted, and some of this was incorporated into the prevailing opinions. These quotations were as far as possible investigated by the government, but time did not permit of any considerable independent search for such material, although some was added both by the government and by the judges.[1] I think it especially a matter of doubt whether the future critic will agree with the majority of the court as to the relative weight to be given to the various classes of historical evidence considered; and he will claim the right to an independent judgment,

[1] The petition for rehearing was filed April 15. The court set the application for May 6, and then directed that the argument proceed forthwith. The case was decided May 20 (158 U. S. 601, 605–7).

because the ascertainment of an eighteenth century definition is more peculiarly a matter of history than of law. I think that in balancing them against the practical construction given to the Constitution by the Washington and Adams administrations, and against the Hylton case, he will give less weight to the fragments of half-reported debate in the state ratifying conventions. Giving them any weight at all is an exception to the rule which excludes even stenographically reported debates upon the passage of a law, because for various reasons they are so apt not to represent the general consensus of opinion in the legislature as to its meaning.[1] Not only is the reporting so unsatisfactory,[2] but an examination into the details of the Constitution was not primarily the business before these state conventions. They could and did propose amendments, but the main purpose of the men who were most familiar with the Constitution and most interested in procuring its adoption was to get it through the state conventions with as few amendments as possible, and therefore to let sleeping dogs lie. Thus it was intended to give Congress the power to levy stamp duties, but members were desired to say as little as possible on this unpopular subject,[3] and if fully reported Ellsworth observed this precaution in his explanation to the Connecticut convention.[4] The debates in these conventions, so far as reported, were generally on broad lines, and so far as taxation was concerned were occupied with the discussion of the principal taxes with which the minds of the delegates were familiar, without stirring up the question what taxes might conceivably be laid in addition. The same is to be said of such controversial writings as the Federalist, which was published for a present purpose, and was not written consciously to be a permanent classic.

In taking up the discussion it is to be borne in mind that we are studying the terminology of the eighteenth century, and must use with caution any definitions framed by courts or text-writers of a century later.[5] In this connection we must remember that no in-

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[1] Aldridge *v.* Williams, 3 How. (U. S.) 9, 24; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 318. The reasons are explained by Story, J., in Mitchell *v.* Great Works Milling Co., 2 Story (U. S.) 648, 653; Field, J., in Leese *v.* Clark, 20 Cal. 387, 425; County of Cumberland *v.* Boyd, 113 Pa. St., at 57.

[2] P. 280, *supra.*

[3] Luther Martin's Report to the Maryland Legislature (1 Ell. Deb., 2 ed., 368).

[4] 2 *ibid.* 191–6.

[5] 158 U. S., at 686, 699. But see pp. 622, 630, 631.

come tax in the present sense of the phrase, that is, no tax on net incomes or even on gross incomes by actual computation, had yet been laid, so that the delegates are not to be presumed to have had it in mind at all. England had only laid a specific duty on salaries and pensions. The colonies and states had, some of them, in assessing all property for purposes of taxation, included the appraised value of one's profession or trade in the assessment list, while the valuation of property was often reached by calculations based upon an estimate of the value of its annual user.[1]

It will be noticed in the judicial opinions of 1796, as in the argument of Mr. Hamilton at the bar of the court, that they discussed two different distinctions: first, between direct and indirect taxation; and second, between direct taxes on the one hand, and duties, imposts, or excises on the other. Indirect taxation is not, however, mentioned in the Constitution itself, and nothing in the Constitution requires us to give it a legal definition. The other distinction is the only one to be found in that instrument. The distinction between direct and indirect taxation belongs, or belonged (if it is obsolete), to political economy, not to law. Political economy was then in its infancy. Some statesmen, Hamilton and Wilson as well as Morris, were familiar with the new speculations. But most of the leaders in the convention of 1787 were primarily lawyers, who naturally looked at constitutional language from a lawyer's point of view. These would look first at the colonial and state laws of their own homes, and secondly at those of Great Britain, "whence we take our general ideas of taxes, imposts, excises, customs, etc.,"[2] and with which they were then, more than their successors are now, familiar. The first would give no definitions upon which all would agree.[3] The second would. I think that they meant by taxes those things which in the English statute book were then called taxes, and that they meant by duties those things which in the English statute book were then called duties,[4] although endeavoring not very successfully to identify the latter class of impositions with those which

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[1] 158 U. S., at 701. Seligman, *ut supra*. Probably this is the tax to which Sedgwick was referring in 1794 as "on property and income generally." His colleague Dexter so understood him (157 U. S., at 568).

[2] P. 283, *supra*.

[3] Wolcott, *ut supra*. Seligman, *ut supra*.

[4] If this view be correct, there was no misunderstanding between Hamilton and the Supreme Court as to the point that he was arguing, as supposed at 158 U. S. 626.

the new science of political economy was then classifying under the head of indirect taxation.[1]

In Great Britain the words "tax" and "duty" had had legal definitions for a century, exclusive of each other, settled and unvarying in their statutory use. A tax was laid upon all property, or upon all real property, at a valuation, and always by a rule of apportionment.[2] The only "tax" in actual use was the general land tax. Everything that was not a tax in this restricted sense was a duty. No duties were laid by any system of apportionment. All were laid by a rule of uniformity. This unvarying distinction in terms in the statute book cannot have been accidental, and must have been familiar to lawyers. Editions of the English statutes were not uncommon in the American law libraries. Pickering's edition came down to 1761 and was printed in 1764 and afterwards continued from that time. This contained the entire text of each act laying a new tax or duty, and contained by title the acts continuing without change the taxes or duties previously levied. The whole subject had been one of great prominence during the years immediately preceding the Revolution, and the act most discussed was the one levying stamp *duties* affecting real as well as personal estate. Our lawyers were then also familiar with the Commentaries of Blackstone, which had been published in 1765 and have been said to have received a wider circulation here than at home. His use of words is careful and accurate. His analysis showed clearly that among duties technically so called were duties upon houses and windows, upon conveyances of land, and upon salaries. I can find no foundation for the contention, sustained in the prevailing opinion of 1895,[3] that income taxes have been

[1] I confess to some difficulty in understanding the majority theory in 1895 as to what indirect taxes were a century earlier supposed to be. Stress is laid upon Fisher Ames' remark that an indirect tax falls "not upon the possession but upon the use" (157 U. S. 569; 158 *ibid.* 624, 625), but that sustains the minority view (158 U. S. 665–9, 693, 702). Reference is also made to Adam Smith (157 U. S. 559; 158 U. S. 627), but he also applies the words "direct" and "indirect" rather to the method than the subject of taxation, considering that the same subject may be taxed either directly or indirectly (Wealth of Nations, Rogers' ed., ii., 453). Finally, it is said, what was decided in the Hylton case "was, then, that a tax on carriages was an excise, and, *therefore*, an indirect tax" (158 U. S. 627), although it fell entirely on Hylton if the case stated in the pleadings was correct (p. 283, n. 1, *supra*). This is precisely the theory for which the government contended.

[2] There was no capitation tax, which therefore had no place in the British classification. This may explain why the committees of detail and style in the convention of 1787 gave it a class by itself.

[3] 157 U. S, at 572.

always classed by the law of Great Britain as direct taxes, except the opinions, cited by the court, construing the British North America Act of 1867.[1] These throw no light upon the intent of our statesmen of eighty years before. The earlier English taxes described by Blackstone[2] were succeeded by the general Act of 1689,[3] which was apportioned in 1692 among the different counties, cities, and boroughs, and was continued as an apportioned tax by annual statutes until 1798, when Pitt made the tax perpetual. There was at first some collection of this tax from personalty, but it speedily became a land tax and nothing else.[4] The apportionment was very unfair from the start,[5] and the disparity of course grew worse as time went on. It was collected by officials known as the "commissioners of the land tax." The title of the statute after 1703 remained in a substantially unvarying form as follows: "An Act granting an aid to Her Majesty by a land tax to be raised in the year [blank]." When made perpetual in 1798,[6] it was still referred to as the "land tax." Besides this apportioned tax there was another system of taxation, applicable to real as well as to personal property. This was a system of uniformity, and the imposts were unvaryingly called duties. Thus we have in 1696 the "Act for granting to His Majesty several *rates or duties* upon houses for making good the deficiency of the clipped money."[7] Pickering's Abstract of 1764 says of this: "Duties to be charged on inhabitants. Commissioners for the land *tax* 7 & 8 W. III, c. 5 to execute this for the first year." We still have the same terminology in the statute of 1765, "for repealing the several *duties* upon houses, windows, and lights," etc.;[8] a statute which established a uniform duty on dwelling-houses in England of three shillings, and in Scotland of one shilling, with a graduated scale of duties on windows or lights. In three statutes the house duties were classed with the "duties upon coal, culm, and cynders."[9] The famous Stamp Act of 1765 did not purport to lay a tax at all, but a "stamp *duty*."[10] What has sometimes been called the first income tax law was the statute of the elder Pitt of 1758 "for grant-

[1] 158 U. S., at 631.
[2] 1 Bl. Com. 308–12.
[3] 1 Wm. & M., c. 20.
[4] 1 Dowell, Hist. of Taxation in Eng., 51–3.
[5] *Ibid.*, 109.
[6] 38 Geo. III, c. 5.
[7] 7 & 8 W. III, c. 18. As to the phrase "rates or duties," *cf.* an act of 1794, *supra*, p. 282.
[8] 6 Geo. III, c. 38.
[9] 8 Anne, c. 4; 3 Geo. I, c. 8; 5 Geo. I, c. 19.
[10] 5 Geo. III, c. 12.

ing to His Majesty several *rates and duties* upon offices and pensions, upon houses, upon windows or lights," etc.[1] This statute consistently referred to its own exactions as "duties," although it referred to "the last assessment of the land *tax*," that is, the assessment of 1692, and confided its execution to "the commissioners of the land *tax*."[2] The first general income tax law was the younger Pitt's famous statute of 1799,[3] three years after the Hylton case. This also levied "rates and duties" upon incomes, whether they "shall arise from lands, tenements, or hereditaments" or "from any kind of personal property or other property whatever or from any profession," etc.

One of the things that is peculiarly striking about these clauses of the Constitution is the small amount of discussion which they apparently provoked at the time, a feature which would seem to indicate both a general recognition of the meaning of the terms used, and that that meaning was one which led to results satisfactory to all. The only uniformity of meaning, as has been just stated, is to be found in the British statute book. If the words were used in that meaning, the general acquiescence in the result would be at once explained. It would show that the delegates did not worry about whether a tax on any particular subject of taxation would be regarded as a direct tax or a duty, because the Constitution was not understood to be binding the nation beforehand in any particular as to the selection. The evil feared was a combination of seven states, perhaps the seven small ones, to overassess the property, or lay discriminating duties upon the products, of the other six. The remedy was to prevent any apportionment of taxes otherwise than by the rule of population, and to prevent any levying of duties by a rule which should differ between one state and another. It would show a common understanding, tacitly assumed by everybody, that direct taxes must necessarily, *ex vi termini*, be laid by some rule of apportionment, so that the only question was what the rule of apportionment should be; while duties, imposts, and excises must as necessarily be levied without apportionment, so that the only question was whether they should be uniform throughout the United States, or whether Congress should be allowed to levy special duties in particular localities.

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[1] 31 Geo. II, c. 22.

[2] See also Mr. Pitt's Consolidated Fund Act of 1787, 27 Geo. III, c. 13.

[3] 39 Geo. III, c. 13.

In other words, the former would be the general property taxes laid according to a general valuation, while the latter would include those on specific property, together with stamp duties, license duties, business duties, and duties on salaries and pensions. Taxes invented in the future (and the general income tax is one of these) would be left to be classified in the future.

Apportioned taxes have turned out a failure. They are difficult enough to assess within the limits of a state, and under control of a state board of equalization. They have been tried by the nation,[1] and each trial was a failure. The last direct tax levied was paid back again.[2] There will probably never be another. Whatever taxes are levied in the future will be levied under the rule of uniformity. If we are to amend the Constitution, a matter now so often discussed, we should not try to tinker it by introducing a specific exception to a broken down general rule. Amendments to the Constitution should conform to its main plan. They should be drawn on broad lines, and not introduce a multitude of special cases.[3] If the apportionment clause is to be touched at all, it is as easy to repeal it altogether. If there are any taxes that ought to be left to the states (and a general tax upon all property at a valuation, a tax which necessarily involves an apportionment in order to avoid variations in the rate of assessment, is one of these), the constitutional amendment should distinctly specify them and simply state that the nation is not to levy them. All taxation not forbidden should be permitted, and it should all be uniform throughout the land.

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[1] 157 U. S., at 572–3.

[2] Act of March 2, 1891, c. 496.

[3] See Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. (U. S.), at 407.